

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

STEVEN L. KLINGER, JR. and
SHEILA J. KLINGER,

Plaintiffs,

v.

WELLS FARGO BANK, NA and
NORTHWEST TRUSTEE SERVICES,
INC.,

Defendants.

No. C10-5546RJB

ORDER GRANTING DEFENDANT
NORTHWEST TRUSTEE SERVICES,
INC. MOTION FOR SUMMARY
JUDGMENT AND DISMISSING CLAIMS
AGAINST NORTHWEST TRUSTEE
SERVICES, INC.

This matter comes before the Court on Defendant Northwest Trustee Services, Inc.'s motion to dismiss that was converted by the Court to a motion for summary judgment. Dkt. 13. The Court has considered the motion and the relevant record herein.

PROCEDURAL AND FACTUAL HISTORY

On April 30, 2008, Plaintiffs Steven L. Klinger and Sheila J. Klinger ("Plaintiffs"), in order to secure payment of a promissory note (the "Note") in the amount of \$243,676.00, granted to Mortgage Electronic Registrations Systems, Inc. ("MERS") as nominee for Lender Pierce Commercial Bank, its successors and assigns ("Lender") a deed of trust (the "Deed of Trust"). Dkt. 13-2. The Deed of Trust encumbers the real property commonly known as 8503 163rd Street Court East, Puyallup, Washington 98375 (the "Property"). *Id.* The Deed of Trust was recorded with the Pierce County Auditor on April 30, 2008. *Id.*

On December 8, 2009, MERS executed an assignment of deed of trust (the

1 “Assignment of Deed of Trust”) whereby it assigned its interest under the Deed of Trust to Wells
2 Fargo Bank, N.A. (“Wells Fargo”). Dkt. 13-3. The Assignment Deed of Trust was recorded on
3 December 9, 2009. *Id.* On December 8, 2009, Defendant Northwest Trustee Service, Inc.
4 (“NWTs”), as agent to Wells Fargo, mailed a Notice of Default to Plaintiffs and posted the
5 Notice of Default at the Property. Dkts. 13-4; 13-5; 13-6.

6
7 On December 9, 2009, Wells Fargo recorded an appointment of successor trustee (the
8 “Appointment of Successor Trustee”) naming NWTs the successor trustee. Dkt. 13-7. On
9 December 15, 2009, Plaintiffs recorded a document entitled “Constructive Legal Notice of
10 Lawful Debt Validation Demand” (the “Recorded Demand”) with the Pierce County Auditor.
11 Dkt. 13-8. The Recorded Demand states that Plaintiffs “dispute the alleged mortgage debt in it’s
12 [sic] entirety for being inaccurate.” *Id.*

13
14 On March 30, 2010, NWTs replied to Plaintiffs via a letter. Dkt. 13-9. Enclosed with
15 their letter NWTs included a payment history of Plaintiffs’ loan, a copy of the Note dated April
16 28, 2008, and a copy of the Deed of Trust. *Id.* On April 24, 2010, Plaintiffs mailed to NWTs a
17 second debt dispute letter, requesting “validation” of the debt. Dkt. 13-10. On May 3, 2010,
18 NWTs claims that it replied to Plaintiffs via a letter, citing Plaintiffs’ previous attempt to
19 “validate” (or invalidate) the debt. Dkt. 13, at 4.

20
21 On May 5, 2010, NWTs recorded a notice of trustee’s sale (the “Notice of Sale”) with
22 the Pierce County Auditor that set a trustee’s sale for August 6, 2010. Dkt. 13-12. On June 19,
23 2010, Plaintiffs mailed NWTs another debt dispute letter, claiming that “I’ve never heard of
24 [NWTs].” Dkt. 13-13. NWTs replied once again on June 23, 2010 and referenced Plaintiffs’
25 previous debt “validation” measures. *Id.*

1 On August 5, 2010, Plaintiffs filed with the Court (1) an application to proceed *in forma*
2 *pauperis*, (2) a proposed Petition, (3) a proposed Petition for Restraining Order, (4) a
3 memorandum in support of the proposed Petition for Restraining Order, and (5) a proposed
4 Petition for Temporary Injunction. Dkt 1. Plaintiffs filed a Return of Service stating their
5 Original Petition and motions for temporary restraining order were served on Defendants via
6 U.S. Mail on August 5, 2010. Dkt. 3.

8 On August 6, 2010, the Property was sold at a trustee's sale to Wells Fargo as the highest
9 bidder. Dkt. 13-15. A Trustee's Deed was delivered and recorded on August 17, 2010. *Id.*

10 On August 11, 2010, the Court issued an order denying Plaintiffs' application to proceed
11 *in forma pauperis*. Dkt. 2. On August 16, 2010, Plaintiffs paid the necessary filing fee. On
12 September 1, 2010, the Court issued an order denying Plaintiffs' motion for temporary
13 restraining order. Dkt. 12.

14 On September 9, 2010, NWTS filed a motion to dismiss. Dkt. 13. Because NWTS
15 included exhibits in support of the motion to dismiss that were outside of the pleadings, the
16 Court converted the motion to dismiss to a motion for summary judgment and notified Plaintiffs
17 of the requirements for responding to a motion for summary judgment. Dkt. 16.

19 In the motion for summary judgment, NWTS argues that any claim against it should be
20 dismissed because (1) Plaintiffs failed to exercise their pre-sale remedies under RCW 61.24.130,
21 and (2) Plaintiffs fail to make any factual allegations as to NWTS in support of any of Plaintiffs'
22 claims. On October 1, 2010, Plaintiffs filed a "Motion to Strike Defendants Motion for
23 Summary Judgment," which is better characterized as a response (and which the Court deems to
24 be a response to NWTS' motion for summary judgment), challenging the relevancy of NWTS'
25 arguments. Dkt. 20. On October 7, 2010, NWTS filed a reply. Dkt. 22.

SUMMARY JUDGMENT STANDARD

Summary judgment is proper only if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). The moving party is entitled to judgment as a matter of law when the nonmoving party fails to make a sufficient showing on an essential element of a claim in the case on which the nonmoving party has the burden of proof. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1985). There is no genuine issue of fact for trial where the record, taken as a whole, could not lead a rational trier of fact to find for the non moving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986)(nonmoving party must present specific, significant probative evidence, not simply “some metaphysical doubt.”). *See also* Fed.R.Civ.P. 56(e). Conversely, a genuine dispute over a material fact exists if there is sufficient evidence supporting the claimed factual dispute, requiring a judge or jury to resolve the differing versions of the truth. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 253 (1986); *T.W. Elec. Service Inc. v. Pacific Electrical Contractors Association*, 809 F.2d 626, 630 (9th Cir. 1987).

The determination of the existence of a material fact is often a close question. The court must consider the substantive evidentiary burden that the nonmoving party must meet at trial – e.g., a preponderance of the evidence in most civil cases. *Anderson*, 477 U.S. at 254, *T.W. Elect. Service Inc.*, 809 F.2d at 630. The court must resolve any factual issues of controversy in favor of the nonmoving party only when the facts specifically attested by that party contradict facts specifically attested by the moving party. The nonmoving party may not merely state that it will discredit the moving party’s evidence at trial, in the hopes that evidence can be developed at trial to support the claim. *T.W. Elect. Service Inc.*, 809 F.2d at 630 (relying on *Anderson, supra*).

1 Conclusory, non specific statements in affidavits are not sufficient, and “missing facts” will not
2 be “presumed.” *Lujan v. National Wildlife Federation*, 497 U.S. 871, 888-89 (1990).

3 DISCUSSION

4 Plaintiffs’ complaint, totaling twenty-fives pages, contains rambling, inarticulate
5 accusations against the banking industry in general. However, because Plaintiffs filed this
6 complaint *pro se*, the Court has construed the pleadings liberally and has afforded Plaintiffs the
7 benefit of any doubt. *See Karim-Panahi v. Los Angeles Police Dep’t*, 839 F.2d 621, 623 (9th
8 Cir.1988).

9
10 Plaintiffs’ complaint can be fairly summarized to allege eight claims: (1) violation of the
11 Truth in Lending Act, 15 U.S.C. § 1601 *et seq*; (2) breach of fiduciary duty; (3) negligence; (4)
12 fraud; (5) breach of an implied covenant of good faith and fair dealing; (6) intentional infliction
13 of emotional distress; (7) unjust enrichment; and (8) deceptive advertising and business practices
14 in violation of 15 U.S.C. § 45. Dkt. 5. NWTS seeks dismissal of all claims alleged against it.
15 Dkt. 13.

16
17 As a preliminary matter, the complaint does not mention NWTS in any section of the
18 complaint other than the pleadings’ caption and a paragraph on the first page identifying the
19 parties. Other than a handful of references to the “Trustees” or a “trust Agent,” the allegations in
20 Plaintiffs’ complaint are generally targeted towards the “Defendants” in the case. Nevertheless,
21 the Court will examine each of the claims alleged in the complaint to determine if NWTS should
22 be granted judgment as a matter of law.

23
24 *Claims under the Truth in Lending Act.* Plaintiffs claim that the conduct of Defendants is
25 in violation of the Truth in Lending Act (TILA), 15 U.S.C. § 1601, *et seq.* Dkt. 5, at 22. NWTS
26 argues that any TILA claim against it is time barred. Dkt. 13, at 14.

1 A claim for monetary damages under TILA “may be brought ... within one year from the
2 date of the occurrence of the violation.” 15 U.S.C. § 1640(e). A TILA violation occurs at the
3 time the loan documents are signed. *See Meyer v. Ameriquest Mortgage Co.*, 342 F.3d 899, 902
4 (9th Cir.2003); *see also Vatomanyuk v. Quality Loan Service Corp. of Washington*, 699
5 F.Supp.2d 1242, 1244 (W.D.Wash.2010).

6 Here, the evidence shows that the loan in question was closed in April 2008 (Dkt. 13-1)
7 and that Plaintiffs filed their claims under TILA in August 2010 (Dkt. 5). Plaintiffs’ claims for
8 monetary damages under TILA were therefore brought outside the limitations period.
9

10 Plaintiffs also apparently argue that the limitations period for TILA should be equitably
11 tolled. Dkt. 5, at 14. For a TILA claim, equitable tolling “suspend[s] the limitations period until
12 the borrower discovers or had reasonable opportunity to discover the fraud or nondisclosures that
13 form the basis of the... action.” *King v. State of Cal.*, 784 F.2d 910, 915 (9th Cir.1986).
14 However, “[w]here equitable tolling may be applicable to a federal claim, the ‘claim accrues ...
15 upon awareness of the actual injury, not upon awareness that this injury constitutes a legal
16 wrong.’” *Lukovsky v. San Francisco*, 535 F.3d 1044, 1049 (9th Cir.2008). Here, Plaintiffs have
17 not provided evidence to show that they only discovered the alleged TILA violations outside the
18 limitations period or that they did not have a reasonable opportunity to discover the alleged fraud
19 or non-disclosures within the limitations period. Accordingly, because equitable tolling of the
20 TILA statute of limitations is not proper for this claim, the claim should be dismissed.
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23 *Breach of fiduciary duty.* Plaintiffs allege that “Defendants...owed [Plaintiffs] a
24 fiduciary duty of care with respect to the mortgage loan transactions and related title activities
25 involving the Trust Property.” Dkt. 5, at 19. Although the “Trust Property” is not identified in
26 the complaint, Plaintiffs presumably refer to the real property that is the focus of this dispute.

1 NWTS argues that as a successor trustee involved in the non-judicial foreclosure process, it owes
2 no fiduciary duty to Plaintiffs. Dkt. 13, at 12.

3 Breach of a fiduciary duty imposes liability in tort. *Tedvest Agrinomics VI v. Tedman*
4 *Properties V*, 49 Wn.App. 605, 607 (1987). In order to prevail, Plaintiffs “must establish: (1) the
5 existence of a duty [owed to them]; (2) a breach of that duty; (3) a resulting injury; and (4) that
6 the claimed breach was the proximate cause of the injury.” *Hansen v. Friend*, 118 Wn.2d 476,
7 479 (1992). Whether a legal duty exists is a question of law. *Id.*

9 Washington’s Deed of Trust Act provides that “the trustee or successor trustee shall have
10 no fiduciary duty or fiduciary obligation to the grantor or other persons having an interest in the
11 property subject to the deed of trust.” RCW 61.24.010(3). This subsection became effective on
12 June 12, 2008, and was intended to address ambiguities regarding the duties of a trustee after the
13 Washington Supreme Court imposed dual (and in many ways competing) obligations in *Cox v.*
14 *Helenius*, 103 Wn.2d 383 (1985). See Wash. Senate Bill Report, 2008 Reg. Sess. S.B. 5378
15 (February 9, 2008); Wash. House Rep. Bill Report, 2008 Reg. Sess. S.B. 5378 (March 6, 2008)
16 (discussing how SB 5378 clarified RCW 61.24.010 to state that a trustee owes no fiduciary
17 duty).

19 Accordingly, when Wells Fargo appointed NWTS as a successor trustee on December 8,
20 2009, NWTS owed no fiduciary duty to Plaintiffs. Because no duty existed, Plaintiffs’ claim that
21 NWTS breached a fiduciary duty should be dismissed as a matter of law.

23 *Negligence.* Plaintiffs claim that NWTS owed to Plaintiffs “a general duty of care...to
24 properly perform due diligence as to the loans and related transactional issues.” Dkt. 5, at 20.
25 NWTS argues that because it is a successor trustee appointed over eighteen months after the
26 origination of the loan, any claim of negligence fails as a matter of law. Dkt. 13, at 12-13.

1 “In an action for negligence a plaintiff must prove four basic elements: (1) the existence
2 of a duty, (2) breach of that duty, (3) resulting injury, and (4) proximate cause.” *Ranger Ins. Co.*
3 *v. Pierce County*, 164 Wn.2d 545, 552-53 (2008) (*quoting Degel v. Majestic Mobile Manor, Inc.*,
4 129 Wn.2d 43, 48 (1996)). If any of these elements cannot be met as a matter of law, summary
5 judgment for NWTs is proper.

6 Here, Plaintiffs have not established that NWTs owed them a duty of care. While
7 Plaintiffs’ allegations relate to the origination of their mortgage, the evidence presented by
8 NWTs shows that NWTs only became involved with this loan many months after the conduct
9 described by Plaintiffs took place. Furthermore, Plaintiffs presented no evidence to show that
10 NWTs had any role other than that NWTs sets forth in its motion for summary judgment.
11 Because there are no genuine issues of material fact, Plaintiffs’ negligence claim should be
12 dismissed.
13

14 *Fraud.* Plaintiffs bring a claim of common law fraud, arguing that NWTs promulgated
15 false misrepresentations to cause Plaintiffs to enter in to their mortgage “without knowledge or
16 understanding of the terms thereof.” Dkt. 5, at 21.

17 Under Washington law, a claim for fraud has the following nine elements: “(1)
18 representation of an existing fact; (2) materiality; (3) falsity; (4) the speaker’s knowledge of its
19 falsity; (5) intent of the speaker that it should be acted upon by the plaintiff; (6) plaintiff’s
20 ignorance of its falsity; (7) plaintiff’s reliance on the truth of the representation; (8) plaintiff’s
21 right to rely upon it; and (9) damages suffered by the plaintiff.” *Stiley v. Block*, 130 Wn.2d 486,
22 505 (1996).
23

24 To survive a motion to dismiss, a complaint must plead allegations of fraud with
25 particularity. Fed.R.Civ.P. 9(b). The complaint must include “an account of the ‘time, place,
26

1 and specific content of the false representations as well as the identities of the parties to the
2 misrepresentations.’” *Swartz v. KPMG LLP*, 476 F.3d 756, 764 (9th Cir.2007) (quoting *Edwards*
3 *v. Marin Park, Inc.*, 356 F.3d 1058, 1066 (9th Cir.2004)). Moreover, “Rule 9(b) does not allow a
4 complaint to merely lump multiple defendants together but requires plaintiffs to differentiate
5 their allegations when suing more than one defendant and inform each defendant separately of
6 the allegations surrounding his alleged participation in the fraud.” *Id.* at 764-65 (internal
7 quotation and edits omitted). Thus, where, as here, a fraud suit involves multiple defendants, “a
8 plaintiff must, at a minimum, identify the role of each defendant in the alleged fraudulent
9 scheme.” *Id.* at 765 (internal quotation and edits omitted).

11 Rather than identifying the specific circumstances of NWTS’ allegedly fraudulent
12 conduct, Plaintiffs make broad allegations that “Defendants” made non-specified negligent
13 misrepresentations to Plaintiffs. Plaintiffs have failed to identify what role NWTS played in any
14 alleged fraud. Furthermore, Plaintiffs did not produce any evidence regarding any of the
15 elements of fraud to rebut NWTS’ motion for summary judgment. Accordingly, this claim
16 should be dismissed.

18 *Breach of an implied covenant of good faith and fair dealing.* Plaintiffs argue that
19 NWTS breached the implied covenant of good faith and fair dealing when NWTS (1) failed to
20 provide all proper disclosures and (2) failed to perform valid or properly documented
21 substitutions and assignments “so that Plaintiffs could ascertain their rights and duties.” Dkt. 5,
22 at 22.

24 There is in every contract an implied duty of good faith and fair dealing. *Badgett v.*
25 *Security State Bank*, 116 Wn.2d 563, 569 (1991). This duty obligates the parties to cooperate
26 with each other so that each may obtain the full benefit of performance. *Id.*

1 Here, Plaintiffs have not shown how NWTs' alleged failure to disclose prevented
2 Plaintiffs from receiving the benefits of the loan agreement. Plaintiffs' rights and duties were
3 established by the original mortgage documents and any assignment of the Note did not change
4 Plaintiffs' rights and duties. This claim should be dismissed.

5 *Intentional infliction of emotional distress.* Plaintiffs claim that Defendants were liable
6 for the tort of intentional infliction of emotional distress, also known as outrage. Dkt. 5, at 23.

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8 "The tort of outrage requires the proof of three elements: (1) extreme and outrageous
9 conduct, (2) intentional or reckless infliction of emotional distress, and (3) actual result to
10 plaintiff of severe emotional distress." *Kloepfel v. Bokor*, 149 Wn.2d 192, 195 (2003). "The
11 question of whether certain conduct is sufficiently outrageous is ordinarily for the jury, but it is
12 initially for the court to determine if reasonable minds could differ on whether the conduct was
13 sufficiently extreme to result in liability." *Dicomes v. State*, 113 Wn.2d 612, 630 (1989); *see*
14 *Robel v. Roundup Corp.*, 148 Wn.2d 35 (2002). "The first element requires proof that the
15 conduct was 'so outrageous in character, and so extreme in degree, as to go beyond all possible
16 bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized
17 community.'" *Robel*, 148 Wn.2d at 51 (quoting *Dicomes*, 113 Wn.2d at 630).

18
19 Here, NWTs' alleged conduct does not exceed all bounds usually tolerated by decent
20 society. Plaintiffs' conclusory statement that Defendants' conduct was extreme and outrageous,
21 without alleging facts or producing evidence to support this legal conclusion, is insufficient as a
22 matter of law. Moreover, Plaintiffs assert that they suffered severe emotional distress, but do not
23 allege any facts in support of this assertion. Because Plaintiffs have not met their burden to
24 establish a genuine issue of material fact, this claim should be dismissed.
25
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1 *Unjust enrichment.* Plaintiffs appear to allege that NWTs was unjustly enriched as result
 2 of various “spurious fees and charges.” Dkt. 5, at 18. Under Washington law, unjust enrichment
 3 is composed of three elements: “(1) the defendant receives a benefit, (2) the received benefit is at
 4 the plaintiff’s expense, and (3) the circumstances make it unjust for the defendant to retain the
 5 benefit without payment.” *Young v. Young*, 164 Wn.2d 477, 484-485 (2008).

6 A party may not bring an unjust enrichment claim where an express contract governs the
 7 relationship between the parties. *MacDonald v. Hayner*, 43 Wn.App. 81, 85-86 (1986). “A
 8 party to an express contract is bound by the provisions of that contract and may not disregard the
 9 same and bring an action on an implied contract relating to the same subject matter, in
 10 contravention of the express contract.” *Id.* Here, notwithstanding the fact that NWTs became
 11 involved with this mortgage more than eighteen months after the origination of the loan,
 12 Plaintiffs’ express contract with their lender bars them from bringing an unjust enrichment claim
 13 relating to the loan contract. *See Guketlov v. Homekey Mortg., LLC*, 2009 WL 3785575
 14 (W.D.Wash.2009). Accordingly, this claim should be dismissed.

15 *Deceptive advertising and unfair business practices in violation of 15 U.S.C. § 45.*

16 Plaintiffs allege that Defendants have engaged in a variety of unfair and unlawful
 17 business practices in violation of the Federal Trade Commission Act, 15 U.S.C. § 45 *et seq.* This
 18 section of the United States Code, however, does not provide for any private cause of action.
 19 *See, e.g., Holloway v. Bristol-Myers Corp.*, 485 F.2d 986, 988 (D.C.Cir.1973). Therefore, this
 20 claim should be dismissed.

21 **ADDITIONAL COMMENTS**

22 Finally, the Court notes at least eleven other cases in federal district courts across the
 23 country where complaints identical to the current one (with the insertion of different parties and
 24

monetary damages) have been filed. *See, e.g., Robertson v. Bank of America, NA*, 2010 WL 3300851 (N.D.Cal.2010); *Craig v. The Bank of New York Mellon Corporation*, 2010 WL 3009461 (S.D.N.Y.2010); *Gharbi v. Flagstar*, 2010 WL 3494762 (W.D.Tex.2010); *Gharbi v. Flagstar* 2010 WL 3494763 (W.D.Tex.2010); *Forsyth v. Wachovia Mortgage*, 2010 WL 3494931 (W.D.Tex.2010); *McComas v. One West Bank*, 2010 WL 1842198 (N.D.Cal.2010); *Vogler v. Countrywide Home Loans, Inc., et al.*, 2010 WL 3394034 (M.D.N.C.2010); *Geans v. Oxford Bank*, 2010 WL 3273276 (E.D.Mich.2010); *Grandy v. BAC Home Loan Servicing, LP*, 2010 WL 3842428 (E.D.N.Y.2010); *Rice v. JP Morgan Chase Bank, N.A.*, 2010 WL 3586740 (D.Or.2010); *Ray v. HSBC Bank, N.A.*, 2010 WL 3528554 (W.D.N.C.2010).

Additionally, this cut-and-paste complaint has been filed in three cases in this district in just the last three weeks. *See Kehaulani v. BAC Home Loans Servicing, LP*, No. 3:10-cv-05698-BHS (filed September 27, 2010); *Kehaulani v. Washington State Employees Credit Union*, No. 3:10-cv-05699-BHS (filed September 27, 2010); *Schanne et al v. Nationstar Mortgage LLC*, No. 3:10-cv-5753-BHS (filed October 14, 2010).

Plaintiffs are apparently using frivolous arguments and vexatious federal litigation in an attempt to eliminate their mortgage obligations through some sort of administrative process. The parties are warned that such conduct may be sanctionable. *See Fed.R.Civ.P. 11*.

ORDER

Therefore it is hereby **ORDERED** that Defendant Northwest Trustee Services, Inc.'s motion to dismiss (Dkt. 13) is **GRANTED**. Plaintiffs' motion to strike Northwest Trustee Services, Inc.'s motion for summary judgment (Dkt. 20) is **DENIED**. All claims against Defendant Northwest Trustee Services, Inc.'s are **DISMISSED**.

1 The Clerk is directed to send uncertified copies of this Order to all counsel of record and
2 to any party appearing pro se at said party's last known address.
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4 DATED THIS 20th day of October, 2010.
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9 ROBERT J. BRYAN
10 United States District Judge
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